United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1602

To be argued by
EDWARD GASTHALTER, ESQ.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1602

B/S

UNITED STATES OF AMERICA,
Appellee,

—v.—

JERRY ROSENBLUM,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

Statement of the Issues Presented for Review

1. Did The District Judge Commit Reversible Error By Permitting The Government To Introduce Evidence Which Should Have Been Properly Excluded By Operation Of The Doctrine Of Collateral Estoppel?

2. Did The District Judge Commit Reversible Error By Refusing To Permit Defense Witness Henry Mayorga To Testify?

Statement of Facts *

1. Introduction.

This is an appeal from the final judgment of the United States District Court for the Eastern District of

* The reproduced appendix is cited *infra* using the prefix "A." References to the trial transcript bear the prefix "R'. References to the transcript of the first trial bear the prefix "FT." "GX" refers to Government exhibits. "DX" refers to defense exhibits.

New York (Neaher, J.), entered on December 17, 1976, after a jury trial, convicting the defendant-appellant, Jerry Rosenblum, (hereinafter "the appellant"), of conspiring to distribute and possess with intent to distribute narcotics in violation of section 846 of Title 21 United States Code.

The appellant, twenty-four years of age, was sentenced to a term of imprisonment of four years to run concurrently with an unexpired special parole term previously imposed, plus a special parole term of six years. Execution of the sentence was stayed pending appeal (A. 64). The Board of Parole, however, revoked appellant's parole and he has been incarcerated since January 6, 1977.*

2. The Indictment And First Trial.

The indictment as handed down by the Grand Jury and filed in the District Court consisted of eight counts and named the appellant and one Henry Mayorga as defendants (A. 6-8).

More specifically, count one alleged a conspiracy to violate the narcotics laws "on or about and between the 1st day of April 1975 and the 11th day of April 1975, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere".

Counts two and three charged that the appellant and Mayorga possessed with intent to distribute cocaine and

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* In 1973, at the age of 22, the defendant pleaded guilty in the United States District Court for the Eastern District of New York to the crime of conspiring to distribute and possess with intent to distribute narcotics (cocaine). He was sentenced by Judge Rayfiel to a term of imprisonment of six months and placed on special parole for five years.

distributed cocaine on April 3, 1975 within the Eastern District of New York.

Count four charged that the appellant possessed with intent to distribute cocaine on April 4, 1975 within the Eastern District of New York.

Count five charged that the appellant and Mayorga distributed cocaine on April 4, 1975 within the Eastern District of New York.

Count six charged that the appellant possessed with intent to distribute cocaine on April 9, 1975 within the Eastern District of New York.

Count seven charged that the appellant and Mayorga distributed cocaine on April 9, 1975 within the Eastern District of New York.

Count eight charged that the appellant possessed with intent to distribute cocaine on April 11, 1975 within the Eastern District of New York.

The trial commenced before Judge Neaher and a jury on December 8, 1975. On December 22, 1975, after extensive deliberations, the jury acquitted the appellant of counts 4, 5, and 8 but failed to reach a verdict on counts 1, 2, 3, 6, and 7 insofar as they concerned the appellant and any counts insofar as they concerned Mayorga (A. 3).

Thereafter, the District Judge declared a mistrial as to counts 1, 2, 3, 6, and 7 insofar as they concerned the appellant but granted Mayorga's motion for a judgment of acquittal on all counts (A. 3).*

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* The Government filed a notice of appeal to this Court from Judge Neaher's order dismissing the indictment against Mayorga but subsequently withdrew the appeal (A. 3).

3. The Indictment And Second Trial.

(a) The Motion to Preclude.

On October 26, 1976 the re-trial of the appellant on counts 1, 2, 3, 6, and 7 was begun before Judge Neaher and a jury (A. 3).

Prior to the commencement of the re-trial, appellant filed a motion pursuant to Rule 12 of the Federal Rules of Criminal Procedure to preclude the Government from presenting at trial, for any purpose whatsoever, any evidence whatsoever concerning counts 4, 5, and 8 (relating to April 4 and April 11, 1975), of which counts appellant was heretofore acquitted by a jury (A. 12-15).

Over the strenuous objection of defense counsel, which objection was renewed throughout the trial where appropriate, this motion was denied and evidence concerning the events of April 4 and April 11, 1975 was permitted to reach the jury. As will be shown more fully below, we submit, this ruling of the District Judge was erroneous.*

(b) The Government's Case.

Precisely as in the first trial, the Government's case consisted of the testimony of cooperating witnesses Donald Ackerman and William Kwastel, named in the indictment as co-conspirators but not defendants, the testimony of Drug Enforcement Agent Michael Levine and surveillance and back-up agents working with Levine, and the exhibits, consisting of cocaine, envelopes in which

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* Prior to his charge, it was agreed that a redacted indictment excluding counts 4, 5, and 7, should be prepared and the District Judge read from that redacted indictment to the jury (R. 94-96, 1089-1092; A. 9-11).

the cocaine was allegedly delivered, an alleged price list, and money obtained by the agents during the course of their activities.* However, unlike the first trial at which the Government offered as part of its case tape recordings made between Levine and Kwastel, at the second trial the Government refused to introduce these recordings and the appellant offered them all as part of its case.

The first Government witness, twenty-two year old, Donald Ackerman—a self-confessed drug dealer and perjurer—testified that prior to April, 1975, he had known the appellant for three years (R. 239, 864, 1114-1116). In mid-March, 1975, he met co-conspirator Kwastel together with co-conspirator Sussman. By April 1, Kwastel told him that he had a buyer named "Mike" who was interested in obtaining cocaine. By April 2, he spoke to the appellant, whom he described as his source of cocaine at that time, and together they made arrangements for Kwastel to purchase one ounce of cocaine on April 3 and thereafter, if things worked out, additional amounts (R. 181-185).

On April 3 he met Kwastel at 3:30 or 4 o'clock as planned. Together they drove to a house at 152nd Street in Queens and waited inside the car. Shortly thereafter, the appellant came out and told Ackerman that he was waiting for someone else to arrive (R. 188). On cross-examination, he testified that this "someone else" was appellant's "connection . . . Henry" who was "running late" (R. 278, 279, 283-285).**

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* Larry Sussman was also named in the indictment as a co-conspirator but not as a defendant, but did not testify at either trial. The minutes of the first trial have been certified and transmitted to this Court as part of the Record on Appeal.

** At the first trial and before the Grand Jury, Ackerman identified his "connection . . . "Henry" as Henry Mayorga, the then co-defendant (FT. 586-88). In the instant trial, Mayorga was identified on direct-examination by Special Agent Fillmore (R. 851).

Soon thereafter, a silver-grey Chevrolet approached containing two males. Appellant noted its arrival, spoke to the people in the car and then entered the house with Henry and the other male where he remained for about ten minutes before coming out and asking Ackerman and Kwastel to come into the house (R. 285-86). Inside the house, Ackerman again saw Henry while walking with the appellant and Kwastel to the third level attic apartment (R. 287).

Once there, appellant produced a plastic bag which contained one ounce of cocaine which he gave to Kwastel to weigh and to try. Kwastel indicated he would take the cocaine and handed the appellant $100 bills. Appellant left the room for about two minutes to give the money to Henry, who then left the house as per pre-arranged plan. Appellant re-entered the room, discussed future transactions with Kwastel and Ackerman, and escorted them downstairs and out of the house (R. 188-190, 288-283). Outside, Ackerman dropped Kwastel off a few blocks away from where he was to meet his buyer "Mike" and returned home (R. 191).

Government surveillance agent Pavlick testified that he noted the presence of Ackerman, Kwastel, and the appellant at the house on 152nd Street on April 3 and surveillance agent Fillmore captured their presence in photographs which were introduced in evidence (GX 17, R. 865). Additionally, Fillmore, on direct examination, testified that on April 3 at about 5 o'clock he observed Henry Mayorga and one Nathan Shop leave the house. About fifteen minutes thereafter he observed Ackerman and Kwastel leave and some five minutes after that observed appellant exit (R. 850-51).

Kwastel, also in his mid-twenties, and the subject of numerous narcotics cases pending in the Eastern as well

as the Southern District, testifying as a Government witness, confirmed that on April 3 at the house on 152nd Street, appellant had sold him one ounce of cocaine which he subsequently delivered to his buyer, "Mike", who was, in reality, Drug Enforcement Agent Michael Levine (654-661, 729-739). Levine testified that he received the cocaine from Kwastel on April 3 after paying him $2,000 and it was received in evidence (R. 379-381, GX 1).

Continuing his testimony on direct examination, Ackerman stated that on April 4, 1975, he spoke to Kwastel who informed him that his purchaser, "Mike," was satisfied with the cocaine he had received the previous day and wanted to make another purchase from "us" (R. 195). Arrangements were made with appellant for this purchase and on April 4 at 8 p.m., the second sale of cocaine took place at the Liberty Travel Agency in Forest Hills where Ackerman worked (R. 192-199).

Ackerman further testified that on that same day, after speaking with the appellant, he jotted down prices on a piece of paper for different amounts of cocaine and gave "this list to Kwastel to pass on to his buyer" (R. 210).

On direct examination, Kwastel confirmed that he had spoken to Ackerman by phone on April 4 and advised him that he had arranged to do another deal with his purchaser "Mike" for 1½ ounces of cocaine. Ackerman, in turn, told him to call back in twenty minutes because "the package hadn't arrived yet." Upon placing the second call, Ackerman told him to come and pick it up "in exactly seven minutes." Kwastel confirmed that after receiving $3,000 from "Mike", he went to the Liberty Travel Agency, received 1¼ ounces of cocaine and de-

livered the cocaine, together with a $500 refund for the lesser weight, to "Mike" (R. 663-64). On direct examination he also stated that on April 4 he spoke with Ackerman and Ackerman "suggested that Jerry Rosenblum was his connection for cocaine" (R. 663).

Agent Levine, on direct examination, testified that on April 4 he told Kwastel he wanted to purchase 1½ ounces of cocaine for the sum of $3,000. Thereafter, he went to Sussman's residence to wait for Kwastel who came by cab 15 minutes later. All three drove to a phone booth on Yellowstone Boulevard where Kwastel got out to make a phone call. Kwastel returned to the car and told Levine that "he had spoken to Don and that Don was at work waiting for his connection to come with the package and the connection had not arrived yet" (R. 392). Seven minutes later he arrived with Kwastel at the Liberty Travel Agency and gave Kwastel $3,000 in Government funds. Kwastel left the car, came back in about twenty minutes and handed Levine 1¼ ounces of cocaine enclosed in an envelope bearing the name and address of York College, together with a refund of $500 because the cocaine had weighed ¼ ounce less than agreed to (R. 393). This cocaine and the York College envelope were received in evidence as was the "price list" given to Levine by Kwastel who had received it from Ackerman who had written it after he had spoken to the appellant on April 4 (R. 394-395, GX-4; R. 210, 401-403, GX-6).

On direct examination, Agent Pavlick testified that again on April 4 at 8:25-8:30 he was engaged in surveillance. He observed Ackerman leave the Liberty Travel Agency, walk to a parking lot at the rear of the agency, get into appellant's Chevrolet and stay there for approximately five minutes. Thereafter, Ackerman went back inside. Ten minutes later he observed Levine, Kwastel, and Sussman drive up in Levine's car. Kwastel

got out, went into the agency for about ten minutes, left the agency, got back into the car with Levine and Sussman and drove off (R. 597-598). Surveillance Agents Smith and Fillmore confirmed the observations of Agent Pavlick (R. 817, 852-854).*

Continuing his testimony, Ackerman stated he spoke to Kwastel who told him his buyer was again satisfied and would like to make a third purchase sometime that week. After he spoke to Kwastel, Ackerman spoke to appellant who told him that he, too, was satisfied. Arrangements were made to transact the third sale on the evening of April 9, again at the Liberty Travel Agency, where Ackerman would be working late. After speaking with the appellant, Ackerman called Kwastel and told him that "the cocaine had been secured" and that he should come to Queens with cash (R. 203).

On April 9 the cocaine was brought to Ackerman's office by the appellant at 7:30 p.m. Appellant and Ackerman further arranged that appellant would "disappear" for about an hour and then come back after the cocaine had been picked up and paid for (R. 203-204).

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* It will, of course be recalled that at the first trial the appellant was *acquitted* by the jury of counts 4 and 5 of the indictment which concerned his alleged possession of cocaine with intent to distribute and distribution of cocaine on April 4, 1975 after the jury had been presented with the *identical evidence* presented at the second trial *as well as* the tape recordings which, as aforestated, the Government elected not to use as part of its case-in-chief. By pre-trial motion, and repeatedly at trial where appropriate, defense counsel strenuously moved to prevent the Government from introducing any evidence whatsoever concerning April 4 and for a mistrial, only to have all of his motions denied (R. 146-166, 196-199, 206-208, 318-329, 372-374, 389-391, 393-394, 588-591, 913-923, 1122-1126).

Kwastel testified that on April 9 after he had spoken to Ackerman, who told him he had two ounces of cocaine, he called "Mike" and told him to meet him at Sussman's house. They all drove in "Mike's" car to a phone booth. Kwastel placed a call and thereafter went to the travel agency where he gave Ackerman $4,000 and, in turn, received two ounces of cocaine (R. 666).

Agent Levine testified that on the evening of April 9 he went with Kwastel and Sussman to the travel agency, gave Kwastel $4,000 in Government funds, and received from Kwastel 2 ounces of cocaine contained in an envelope bearing the name and address of York College. The cocaine was received in evidence (R. 397-400, GX-5), as was the York College envelope (R. 351, 399-400, DX-D).

Surveillance Agent Pavlick, on cross-examination, testified that on the evening of April 9 he did not see appellant in the vicinity of the travel agency nor did the reports of any of the other surveillance agents involved reflect that appellant was in the vicinity of the travel agency on the day in question (R. 650-651).

Continuing his testimony, on direct examination, Ackerman stated that on April 11 he spoke with and saw the appellant several times (R. 208). On that day he and Kwastel also spoke. He informed Kwastel that he was in possession of ¼ pound of cocaine which had been "fronted" to the appellant and himself on a non-returnable basis, and since he could keep it for only a very short time, Kwastel should call his buyer immediately to arrange for him to purchase the cocaine (R. 206).

Kwastel testified on direct examination that on April 11, he spoke again with his buyer. As a result of that conversation he and "Mike" agreed "to do a deal for a

quarter pound of cocaine for $7,300" (R. 667). He, "Mike" and Sussman drove to a phone booth where he placed a call to Ackerman at the Liberty Travel Agency. Ackerman told him to "hurry and come on over, my man is coming by at 4:00 to pick up the cash." They drove to the agency. Mike and Kwastel left Sussman in the car, entered the agency, and sat down at Ackerman's desk. While the "exchange" was being done, all were arrested (R. 667).

Agent Levine testified on direct examination that on April 11 at approximately 3:30 p.m. he met Kwastel and Sussman and they drove to the travel agency. He and Kwastel entered, sat down with Ackerman and at a pre-arranged signal given by himself, they were all arrested. He observed Agent Carlos Smith take an envelope from the inside pocket of Ackerman's jacket. He, Kwastel, and Ackerman were then handcuffed and brought outside the agency. On the street he saw appellant who had also been arrested outside the agency. He and appellant were then placed in a car separate from the others (R. 404-406).

Agent Smith testified on direct examination that on April 11 during the late afternoon he was surveilling appellant. He observed appellant arrive at the Liberty Travel Agency in a brown Chevrolet and walk inside. Smith stood in front of a huge picture window so that he could see clearly. Thereafter, he observed appellant leave the travel agency, walk back to his car and get inside. About one-half hour later he observed Levine and Kwastel enter the agency. About five minutes later, he observed the appellant walking down the street towards the agency, pause in front of the agency and continue onwards. Thereafter, he placed himself in front of the agency to await the pre-arranged signal of Levine and advised fellow agent O'Connor to "keep an eye" on the appellant and when the signal was given to arrest him also. About five minutes later Levine gave the signal and

he placed Ackerman, Kwastel, and Levine under arrest. He proceeded to search Ackerman and inside his right jacket pocket he found a white envelope bearing the name and address of York College containing cocaine as well as two ten dollar bills whose serial numbers had been previously recorded (R. 821-826). The cocaine, the York College envelope, and the two ten dollar bills were all received in evidence (R. 393, 825-826, GX-11 and GX-12).*

Agent Michael O'Connor testified on direct examination that at approximately 3:45 p.m. in the vicinity of Liberty Travel Agency he was conducting surveillance. At 4:00 p.m. he observed the appellant enter the Liberty Travel Agency. Five or seven minutes later, he observed appellant exit the agency and enter a brown Chevrolet. At 4:15 p.m. he observed Kwastel and Levine enter the agency. One minute later, he observed appellant leave his car, walk towards the agency, cross the street and enter a luncheonette. When Agent Smith gave the signal, he placed appellant under arrest, searched him and "advised him of his rights" (R. 867-869). Appellant asked what he had done wrong, and O'Connor informed him that he was in violation of the Federal narcotics laws and that he was going to take him to "join his friends." At that point, the appellant stated, "he had no friends. I don't know what you're talking about" (R. 870).** Levine,

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* Again, as per the footnote, *supra*, concerning the events of April 4, we ask this Court to recall that at the first trial the appellant was *acquitted* by the jury of count 8 of the indictment which concerned his alleged possession of cocaine with intent to distribute on April 11, 1975.

** O'Connor did not testify at the first trial. Defense counsel in the instant case moved pre-trial to suppress the statement but after a hearing his motion was denied, although the District Judge indicated "well, it's a close one, I have to say that" (R. 142, 28-145). On summation, the prosecution argued the statement indicated "evidence of a guilty mind" (R. 1008-1009) and the District Judge so charged the jury (R. 1110-1111).

upon being arrested, had said virtually the same thing to the agents when questioned by his colleagues at the staged arrested (R. 406).

Subsequent to Agent O'Connor's testimony, the Government rested its case subject to the introduction of certain stipulations (R. 878).

(c) The Defense Case.

The appellant called as its witness, Henry Mayorga, who, as aforestated, had been his co-defendant at the first trial before being granted a judgment of acquittal by the District Judge and who, as aforestated, had been repeatedly referred to in the instant trial on direct examination as well as cross-examination, as a participant in the transactions which comprised the indictment.*

The witness was sworn in the presence of the jury but upon objection of the Government was never permitted to answer the question posed. Ultimately, over strenuous objection by defense counsel, the witness was dismissed without offering a word of testimony (R. 881-908).**

As aforestated, at the first trial, the Government had offered on its case-in-chief, tape recordings between Kwastel and Levine as to the transactions charged in the indictment. At the instant trial, the Government refused

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* At the first trial, Mayorga testified in his own defense and exculpated the appellant (FT. 823-861).

** As will be shown more fully below in Point II, we submit, the failure to permit Mayorga to testify constituted reversible error.

to utilize those tapes on its direct-case and the District Judge, despite defense counsel's repeated applications to play those tapes during cross-examination of Government witnesses, refused to permit the tapes to be played. Defense counsel was therefore, compelled to offer the tapes as part of the defense case (R. 944-957, 982; DX T-AA).

(d) The Stipulations.

The Government and defense counsel entered into a series of stipulations:

the name of the appellant was never mentioned on any of the tapes between Kwastel and Levine (R. 982-983);

if a representative of York College appeared he would testify that the records of the college would show that the appellant was in attendance at that college during the years 1970 into 1975 and would further testify that there were never any classrooms at Jewel Avenue in Queens (R. 983);*

if Mr. James J. Falihee was called as a witness by the defense, he would be qualified as an expert in fingerprint analysis and would testify that while employed in the New York City Police Department fingerprint laboratory for over 35 years, he had several hundred occasions to remove fingerprints from containers customarily employed for the packaging of narcotics; that in this case he was never requested to do so by the Government; nor

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* At the first trial, a representative of York College testified as a Government witness.

was he familiar with the policy of the Drug Enforcement Administration regarding fingerprints (R. 984);*

at the time of his arrest, appellant was 22½ years of age (R. 992).

(e) The Verdict.

After two days of intensive deliberation, the jury convicted the appellant of the conspiracy count and indicated that it could not reach a verdict on the four remaining substantive counts (R. 1196). At sentencing, these remaining counts were all dismissed upon application of the Government (A. 64).

ARGUMENT

POINT I

The District Judge Committed Reversible Error By Permitting The Government To Introduce Evidence Which Should Have Been Properly Excluded By Operation Of The Doctrine Of Collateral Estoppel.

As has been shown more fully in the statement of facts, prior to the instant trial the appellant had already been tried once for the charges contained in the indictment and had been acquitted by the jury of three substantive counts—4, 5, and 8. Inasmuch as the jury

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* At the first trial, Falihee testified as defense witness.

At the first trial, it was also stipulated that the Government retained an expert to determine whether the handwriting appearing on the York College envelopes and "price list" was that of the appellant; that the appellant voluntarily submitted to handwriting analysis, but the expert could not determine whether it was or was not his handwriting.

could not, however, reach a verdict as to the conspiracy count and the remaining substantive counts, appellant was ordered to stand re-trial on those counts (1, 2, 3, 6, and 7).

Being quite cognizant of the crucial fact that issues of ultimate fact or elements essential to conviction had necessarily been determined in his favor by a valid and final judgment in a prior proceeding between the same parties, the appellant duly moved prior to re-trial to preclude the Government from offering any evidence whatsoever concerning counts 4, 5, and 8, for the avowed purpose of proving count 1—which alleged a conspiracy to violate the federal narcotics laws "on or about and between the 1st day of April, 1975 and the 11th day of April, 1975"—or for any other purpose whatsoever, upon the grounds that to do so would violate the doctrine of collateral estoppel and perforce, the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States. *Ashe* v. *Swenson*, 397 U.S. 436 (1970).

During the pre-trial colloquy * on appellant's motion to preclude the Government from offering evidence concerning the acquitted counts, the District Judge perceived the necessary effect of the jury's verdict at the first trial to be as follows:

> "What were those factual issues? Did the defendant possess a quantity of cocaine on April 4?

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* The colloquy focused on the doctrines of collateral estoppel and res judicata as well as double jeopardy and counsel for the Government as well as the appellant submitted memorandums of law to the District Judge in support of their respective contentions (R. 146-166; A 16-19). (*Cf.*) *United States* v. *Friedland*, 391 F.2d 398 (2d Cir., 1968), *cert. den.* 404 U.S. 867 (1971).

No. Did he distribute a quantity of cocaine on April 4? No. Did he possess a quantity of cocaine on April 11? No. . . .

Now what I am saying is, if the words 'collateral estoppel' mean anything to a litigator, they mean that those facts have been settled once and for all, adversely to the Government. And for the Government to attempt to say, despite that adjudication, that it may offer proof that even in support of this other charge, of conspiracy, that he did contrary to the jury's verdict have cocaine on April 4, or distribute cocaine on April 4, and have it again on April 11, to my way of thinking simply undercuts the whole basis of the Supreme Court's reasoning in the Ashe case." (R. 150-151).

"And for whatever reason it [the jury] did what it did, presumably because the nature of the evidence was such at the time, it found against the Government on the defendant's possession and distribution on the fourth of April and on his possession on the eleventh of April.

To that extent, it's my considered judgment that that operates as collateral estoppel and there are those facts once and for all for this case, and that the Government may not use those facts again on the theory that they are going to prove the defendant guilty of some other crime. Conspiracy" (R. 152).

Nevertheless, despite his apparent understanding and rigidly professed adherence to the doctrine of collateral estoppel, the District Judge *unbelievably*, permitted the Government to re-present all evidence concerning the acquitted counts presented to the first jury—short of

direct-testimony placing the appellant in direct possession of the drugs of April 4 and April 11.* The District Judge stated the rationale for his evidentiary rulings to be as follows:

> "I mean as I pointed out to you [defense counsel] at the very outset over and over again I stressed the fact this was a conspiracy which, according to the indictment from the fourth—approximately the first—rather through the eleventh of April.
>
> The Government is entitled to prove that. What I tried to make clear was at no time would I permit the Government to introduce evidence which would seem to me about or directly upon either the possession or the distribution of cocaine by your client on either April 4 or on April 11." (R. 325). . . .
>
> "No matter what you say your man is involved at the moment with a charge of conspiracy extending over the entire period of time. I don't think it's subverting the prior jury finding as long as the evidence didn't show that he possessed or distributed on the dates of the fourth or eleventh" (R. 373).

As will be shown more fully below, the inevitable effect of the District Judge's "sharp line" evidentiary

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* The District Judge stated:

"I realize it's a rather sharp line that I attempted to draw here and that was that there would be no testimony placing the defendant in possession of—whether that was —I mean by testimony to the effect that he had it in his hands or he pulled it out of his pocket or he delivered it to somebody, you understand?" (R. 321). . .

"I have to point out to you when I say, 'evidence of', I say evidence where the witness says, 'I received possession, I received this from Rosenblum'" (R. 326).

rulings was to permit a relitigation of the type precisely condemned in *Ashe, supra.*

At the outset, it is axiomatic that the Double Jeopardy Clause of the Fifth Amendment includes within its scope the principle of collateral estoppel. *United States* v. *Cala*, 521 F.2d 605 (2d Cir., 1975). "Thus, a defendant in a criminal case cannot be convicted on the basis of an issue or ultimate fact which has been determined in the defendant's favor in a prior criminal proceeding involving the same parties" *United States* v. *Tramunti*, 500 F.2d 1334, 1336 (2d Cir., 1974), *cert. den.*, 419 U.S. 1079 (1974).

By acquitting the appellant of counts 4 and 5 at the first trial, the jury necessarily determined that the Government failed to establish beyond a reasonable doubt that on April 4, 1975, within the Eastern District of New York, that appellant "did knowingly and intentionally possess with intent to distribute and did knowingly and intentionally distribute" one ounce of cocaine.

Despite the necessary effect of the jury's verdict, on the re-trial Kwastel testified that on April 4, 1975, he spoke with Ackerman and advised him that he, Kwastel, had agreed to do another deal with his purchaser "Mike." * Ackerman, in turn, told him to call back in twenty minutes because "the package hadn't arrived yet." Upon placing the second call, Ackerman told him to pick up the package in "exactly seven minutes." Ackerman also "suggested" that the appellant was his "*connection for cocaine.*"

Agent Levine testified that on April 4 he, Kwastel and Sussman drove to a phone booth. Kwastel got out

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* Inasmuch as the record citations have already been given in the "statement of facts," they will not be given here.

of the car, made a phone call and told Levine that "he had spoken to Don and that Don was at work waiting for his connection to come with the package and the connection had not arrived yet." Seven minutes later Levine and Sussman arrived at the travel agency with Kwastel who went inside to purchase the cocaine.

Agent Pavlick testified that on April 4 he observed Ackerman leave the travel agency, walk to a parking lot at the rear of the agency, get into appellant's car, stay there for approximately five minutes and go inside. Thereafter, he observed Levine, Kwastel and Sussman arrive. Kwastel got out of the car, entered the travel agency, remained there ten minutes, re-entered the car and drove off with Levine and Sussman.

The cocaine purchased by Levine on April 4 and the York College envelope in which it was allegedly contained was introduced in evidence precisely as it had been at the first trial to substantiate counts 4 and 5 of the indictment.

By juxtaposing the evidence of the first trial with that of the second (the "practical approach" required by *Cala*, *supra*, p. 608, to determine what issues were necessarily resolved in the prior proceeding), we submit, the conclusion is irrefutable that in cardinal defiance of the first jury's verdict of acquittal, the Government was permitted to re-litigate the issue of appellant's alleged possession and distribution of cocaine on April 4 and was permitted to establish that on April 4, appellant was Ackerman's "*connection*" and as such, necessarily possessed and distributed the cocaine received in evidence.

In light of the damning "connection" testimony on direct examination and the ever-present Pavlick's surveillance testimony confirming that on April 4 appellant was

the "connection" (as argued by the prosecutor in summation (R. 994, 1001-1002), the fact that the Government's witnesses were not permitted to give direct-testimony that appellant directly possessed and distributed the cocaine on April 4, does not in the slightest, negate the irrefutable conclusion that the Government re-litigated appellant's possession and distribution of the cocaine on April 4. As the District Judge charged the jury on the matter of *circumstantial evidence*, "if [someone] walks through the door with a dripping umbrella in his hand, you are left with only one inference—it must have been raining outside . . . *Circumstantial evidence, if believed, is of no lesser value than direct evidence*" (R. 1108-09, 1184-1185).

Similarly, by acquitting the appellant of count 8 at the first trial, the jury necessarily determined that the Government failed to establish beyond a reasonable doubt that on April 11, 1975, within the Eastern District of New York, the appellant "did knowingly and intentionally possess with intent to distribute approximately ¼ pound of cocaine." *

Again, despite the necessary effect of the first jury's verdict, Ackerman testified that on April 11 he spoke with and saw the appellant several times. On that day he also spoke to Kwastel. He informed Kwastel that he was in possession of ¼ pound of heroin which had been *"fronted" to himself and the appellant.* Since he could keep it only for a short while, he directed Kwastel to call his purchaser immediately.

Kwastel testified that on April 11 he spoke to "Mike" and they arranged to do a deal for ¼ pound of cocaine

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* Count 8 reads "¼ kilogram". At the first trial the Government conceded that the indictment should read "¼ pound" and the District Judge so-charged the jury (FT. 995).

that day. Kwastel further testified that he placed a telephone call to Ackerman and the latter told him "hurry and come on over, *my man* is coming by at 4:00 to pick up the cash."

Agent Smith testified that on April 11 during the late afternoon he had appellant under surveillance. He observed appellant arrive at the travel agency, walk inside, and then leave. One-half hour later he observed appellant walk down the street towards the agency, pause in front of the agency, and continue onwards until he was arrested.

Again, the cocaine which Agent Levine was to purchase on April 11, allegedly contained in a tell-tale York College envelope, was introduced in evidence precisely as it had been at the first trial to substantiate count 8 of the indictment.*

Once again, we submit, the conclusion is irrefutable that in cardinal defiance of the first jury's verdict of acquittal, the Government was permitted to re-litigate the issue of appellant's alleged possession with intent to distribute cocaine on April 11 and was permitted to establish that on April 11, cocaine was "*fronted*" to appellant and that appellant was Ackerman's "*man*"—and, as such, necessarily possessed the cocaine received in evidence with intent to distribute it.

Moreover, despite the District Judge's "sharp line", on summation, the prosecution argued to the jury, "the allegations here are Jerry Rosenblum *handled narcotics*" (R. 1010). Throughout the trial, never was the jury informed, despite defense counsel's urging, that appellant had been previously acquitted of the April 4 and April 11 transactions (R. 326).

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* See prosecutor's summation concerning the devastating York College envelopes taken in context with the York College stipulation (R. 1004-05).

In this context, the following language in *United States* v. *Phillips*, 401 F.2d 301, 305 (7th Cir., 1968), where the Court reversed the judgment of conviction, is particularly appropriate:

> "The alternative chosen by the Court, admitting the evidence without informing the jury of the acquittal, was clearly erroneous. It deprived appellant of the right not to have those facts that were conclusively determined in the earlier case re-litigated in the instant case."

See also, *Napue* v. *Illinois*, 360 U.S. 264, 270 (1959).

Thus, viewing the evidence in a light most favorable to the Government as we must, we submit, that the compelling and inevitable effect of the District Judge's erroneous evidentiary rulings was, in the context of the entire records of both trials, to permit the Government to obtain a conviction upon the basis of evidence which should properly have been entirely foreclosed from the jury's consideration by operation of the doctrine of collateral estoppel. *Ashe* v. *Swenson*, *supra*; *Harris* v. *Washington*, 404 U.S. 55 (1971); *Sealfon* v. *United States*, 332 U.S. 575 (1948); see also dissent of C.J. Warren in *Hoag* v. *New Jersey*, 356 U.S. 464 (1957), "that a jury verdict of acquittal is determinative of a particular issue that was contested at trial"; *United States* v. *Kramer*, 289 F.2d 909 (2d Cir., 1951); *Phillips* v. *United States*, 502 F.2d 227 (4th Cir., 1974); *Wingate* v. *Wainwright*, 464 F.2d 209 (5th Cir., 1972).

Unlike *Cala*, *supra*, in which the Court found that "the indictment and records of both trials reveal not only that in each case a separate crime relating to a different time period was alleged but that the evidence introduced by the parties in each case was for the most part confined to its separate time period", in the instant case, there

were *no* separate crimes and the time period was *precisely the same.* Unlike *Cala, supra,* in which this Court found that "in the present case not only are the offenses different but they do not arise out of the same transaction," in the instant case, the offenses were *not* different and arose out of *precisely the same transaction.**

Thus, although re-prosecution on the conspiracy count, as well as the hung substantive counts (2, 3, 6, and 7) was not barred under the double jeopardy clause, the Government, as here, could not properly *prove* those charges asserting facts necessarily determined against it on the first trial without doing violence to the doctrine of collateral estoppel. *United States* v. *Kramer, supra.*

Clearly, under the guise of establishing the conspiracy, the Government re-introduced evidence and relitigated issues foreclosed from review by the prior verdict, and thus, perpetrated precisely that type of relitigation condemned by *Ashe* v. *Swenson, supra.* On this record, therefore, the defendant has more than carried his burden of establishing that the issues he sought to foreclose from litigation in the instant trial were necessarily decided in his favor by the prior verdict. *Cala, supra,* p. 608.

Moreover, we submit, that weighing the prejudicial effect against the probative value, there was absolutely no need for the Government to offer evidence concerning the acquitted counts to establish the conspiracy.

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* Despite its affirmance in *Cala,* this Court, nevertheless, saw fit to add the following caveat, which was most applicable to this case:

> "Had the Government introduced evidence at the California trial of Cala's earlier complicity, which formed the basis of his later trial in New York, we would have been faced with a much more difficult question" (p. 609).

It will be recalled that count one charged a conspiracy from "on or about and between the 1st day of April, 1975 and the 11th day of April, 1975." Counts two and three which the jury at the first trial hung on, charged the appellant with possessing with intent to distribute and distributing cocaine on April 3, 1975. Detailed testimony concerning appellant's alleged activities on April 3 was presented to the jury by the co-conspirators, Agent Levine and the back-up agents. Kwastel testified on direct examination that he purchased the cocaine from the appellant. Photographs confirming the testimony of the surveillance agents were received in evidence. The jury heard tapes, albeit at the request of the defense, concerning the transaction. The cocaine allegedly purchased on April 3 was received in evidence.

Likewise, counts 6 and 7 which the jury at the first trial hung on, charged the appellant with possessing with intent to distribute and distributing cocaine on April 9, 1975. Again, detailed testimony concerning appellant's alleged activities on April 9 was presented to the jury by the co-conspirators and Agent Levine. Ackerman testified on direct examination that he obtained the cocaine from the appellant on April 9. The cocaine allegedly purchased on April 9 was received in evidence and also received in evidence was the distinctive York College envelope in which the cocaine was allegedly contained.

In light of the inability of the jury to agree at the first trial concerning counts 2, 3, 6, and 7, this evidence, *concededly* was properly received.* Certainly, if believed, this evidence would more than establish a conspiracy. (To prove a conspiracy to commit a particular substantive offense, the Government need only establish the same

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* We do not concede that the "price list" and "admission" received in evidence was properly received.

degree of intent required for the substantive offense. *United States* v. *Robinson*, — F.2d —, slip op. #445, November 10, 1976). This *was not*, therefore, a case in which the only way the Government could have established the conspiracy—even if it be regarded as a crime separate and apart from the substantive offenses—was through introduction of the tainted evidence.* As this Court most aptly stated in *Kramer*, *supra*, in ordering a reversal of the conviction under the doctrine of collateral estoppel:

> "A defendant who has satisfied one jury that he had no responsibility for a crime ought not be forced to convince another of this even in a prosecution where in theory, although very likely not in fact, the Government need not have tendered the issue" (289 F.2d 915).

In other contexts, this Court has also repeatedly cautioned the Government against unnecessary "over-kill." *United States* v. *Bertolotti*, 529 F.2d 149 (2d Cir. 1975); *United States* v. *Cotroni and Dasti*, 527 F.2d 708, 712 (2d Cir. 1975)—"this 'last nail in the coffin' type of testimony often brings disaster to the overly-thorough advocate."

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* On the facts of the case at bar, the distinction between conspiracy and substantive offenses is a *non-issue. The issue at bar is not "inconsistent verdicts", but rather collateral estoppel.* In *Kramer*, *supra*, this Court, in the context of the doctrine of collateral estoppel, made the following proper observation which is equally applicable to this case in light of the Government's proof at trial:

> "Here also, although, in theory, acquittal of the substantive charges . . ., which demanded proof the criminal acts were done, is not inconsistent with a conviction of conspiracy . . ., which demands only proof of an agreement and a single overt act, *'the core of the prosecutor's case was in each case the same'*" (emphasis supplied, p. 919).

Indeed, *unlike* this case, even if the Government could not prove the conspiracy in any other manner, we submit, it would still be barred from presenting all evidence tainted by operation of the doctrine of collateral estoppel. As the Supreme Court observed in a *per curiam* opinion in *Harris* v. *Washington*, *supra*, which reversed a judgment of conviction under the doctrine of collateral estoppel" . . . the constitutional guarantee applies, irrespective of whether the jury considered all relevant evidence and *irrespective of the good faith of the State in bringing successive prosecutions*" (emphasis supplied, 404 U.S. 55, 56).*

Perhaps the concept was best expressed by the following language of this Court in *Kramer*, *supra*:

> "More important, to permit the Government to force a defendant who has won an acquittal to relitigate the identical question on a further charge arising out of the same course of conduct, selected by the Government from the extensive catalogue of crimes furnished it in the Criminal Code, would permit the very abuses that led English judges to develop the rule against double jeopardy long before it was enshrined in the Fifth Amendment, 3 Holdsworth, History of English Law, 614,—and still longer before the proliferation of statutory offenses deprived it of so much of its effect. See Mr. Justice Brennan's separate opinion in Abbate v. United States, 1959, 359 U.S.

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* Although the holding of *Harris*, *supra*, also applies "*irrespective* of whether the jury considered all relevant evidence," in the instant case, the notes from the jury and its requests to the District Judge during its deliberations make it certain that the jury pondered the evidence and exhibits concerning the happenings of April 4 and April 11 (R. 1128-1188).

187, 196, 201, 79 S. Ct. 666, 3 L. Ed. 2d 729. The very nub of collateral estoppel is to extend *res judicata* beyond those cases where the prior judgment is a complete bar. The Government is free, within the limits set by the Fifth Amendment, see United States v. Sabella, 2 Cir., 1959, 272 F.2d 206, 211, to charge an acquitted defendant with other crimes claimed to arise from the same or related conduct; but it may not *prove* the new charge by asserting facts necessarily determined against it on the first trial, no matter how unreasonable the Government may consider that determination to be" (emphasis supplied, 289 F.2d 919).

POINT II

The District Judge Committed Reversible Error By Refusing To Permit Defense Witness Henry Mayorga To Testify.

At the first trial, the then defendant, Henry Mayorga, testified in his own defense (FT. 825-863). He unequivocally stated that he *never* sold drugs to the appellant and thereby materially controverted the testimony of the Government's witnesses that he was the appellant's supplier (FT. 826, 829). When asked on direct examination whether on April 3, 1975, he was ever at a house located at 85-52 152nd Street, Queens, New York, where the Government alleged narcotics transactions took place, Mayorga replied "I don't know" (FT. 827). Likewise, when asked on cross-examination whether the appellant was at the house on April 3, Mayorga replied "I don't remember if I was even there on April 3" (FT. 850).

Despite the fact that at the conclusion of the first trial, the District Judge dismissed all charges against

Mayorga, at the re-trial, mention was repeatedly made of "Henry" as the appellant's "connection" for cocaine. Moreover, surveillance Agent Fillmore, to confirm the "connection" testimony of Ackerman and Kwastel, stated that on April 3 he observed "Henry Mayorga" and another individual leave the residence at which the co-conspirators testified cocaine was passed.

In light of the fact that Mayorga materially exculpated the appellant at the prior trial, and inasmuch as he was repeatedly referred to on direct examination and cross-examination by the Government witnesses as appellant's "connection", the defense called Mayorga as a witness. He was sworn in the presence of the jury and the following introductory question was posed by defense counsel:

> "Q. Mr. Mayorga, were you indicted in the case wherein you were charged with Mr. Rosenblum as a co-conspirator acting in a conspiracy to distribute cocaine from April 1st to April 11th? (R. 881).

Upon objection by the Government, and after an extensive colloquy, Mayorga was not permitted to answer the question posed and ultimately, left the stand without giving one word of testimony (R. 881-909).*

Despite the repeated mention of Henry Mayorga by the Government witnesses and the irrefutable need by the defense for Mayorga's exculpatory testimony, (which the District Judge had been privy to in its entirety at the prior trial), the District Judge, neverthe-

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* On summation, the prosecutor took full advantage of Mayorga's non-testimony: "There was some testimony about other individuals going in and out of the apartment and some guy named Henry *and what other nonsense*" (R. 1015).

less, denied its relevancy, professed "shock" at what he considered to be the import of defense counsel's question and stated that he would not permit Mayorga to testify unless defense counsel could first establish that Mayorga was present at the house at 152nd Street on April 3, 1975 (R. 879, 899, 902-905, 908). This ruling, in the context of this record, we submit, constituted reversible error.*

In his opening statement, the prosecutor indicated that appellant "is charged with being in a conspiracy with certain other people known as co-conspirators and you will hear more from them" (R. 170). As per the prosecutor's opening statement, the Government called Ackerman and Kwastel who were identified in the indictment as "co-conspirators."

In light of the prosecutor's comment that the jury would hear from those "charged with being in a conspiracy" with the appellant, the defense, we submit, was *equally entitled* to establish that Mayorga was *also charged with being a co-conspirator with appellant in the same conspiracy* but would be testifying for the defense. Similarly, in light of the testimony of the co-conspirators establishing Mayorga as the appellant's cocaine "connection", and the observations of an agent which unmistakable tended to corroborate that testimony, it was entirely proper for the defense to elicit testimony from Mayorga to the effect that he never sold or conspired to sell cocaine to the appellant. Indeed, defense counsel was duty-bound to elicit such exculpatory testimony to refute the Government's contentions, and so informed the District Judge of his entirely proper purpose

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* It should be recalled that despite two trials, appellant was never convicted of any substantive count. Moreover, the record reflects that the jury asked for a definition of conspiracy "in layman's terms" (R. 1160).

when asked to explain why the defense had called Mayorga as a witness:

> "I am going to ask if he distributed cocaine to Mr. Rosenblum in a conspiracy with Mr. Rosenblum to Mr. Ackerman and Mr. Kwastel (R. 881; see also 886, 889-890-896).*

Rule 401 of the Federal Rules of Evidence describes the term "relevant evidence" as follows:

> "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Within the context of that definition and the repeated references to Mayorga by the Government's witnesses—laden with culpability—to state, as did the District Judge, that Mayorga's testimony as a defense witness would be irrelevant, makes a mockery of the concept of relevancy as promulgated under the new rules of evidence.

Likewise, the District Judge well knew—since both counsel for the Government and the defense had informed him at the sidebar—that the transcript of Mayorga's testimony at the first trial revealed that he was unable to state whether or not he had been to the premises on April 3, 1975 (R. 889, 906). By thus compelling defense witness Mayorga to answer an unanswerable question as an absolute prerequisite to further testimony, the District Judge—wittingly or unwittingly—created a quintessen-

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* Although defense counsel never indicated that Mayorga had been a "defendant" and/or had been previously acquitted, upon being accused by the District Judge of asking an improper question, defense counsel repeatedly offered to re-phrase the question if the District Judge would permit the witness to testify (R. 881-909).

tial "Catch 22" situation. The rules of evidence should not, we submit, be so tortured as to prevent the triers of the facts from receiving all competent evidence. As the Supreme Court stated in *Funk* v. *United States*:

> "the fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaption to the successful development of the truth." 290 U.S. 371, 381 (1933).

See also, Lopez v. *United States*, 373 U.S. 427 (1963).

That Mayorga had been previously acquitted of the charges against him and was now testifying as a defense witness, did not in the slightest make his testimony any less relevant, competent or material "to the successful development of the truth."

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment of conviction should be reversed and the indictment dismissed.

Respectfully submitted,

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